Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC., individually and on behalf of a class of persons and entities similarly situated,
PETITIONERS

v.

JOE HUDDLESTON, in his capacity as Commissioner of Revenue for the State of Tennessee

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTION PRESENTED FOR REVIEW

Whether the State of Tennessee, which collected an estimated $24 million in sales tax that has been declared illegal by the Tennessee Supreme Court, is in violation of substantive and procedural due process requirements and this Court's decision in McKesson Corp. v. Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18 (1990) by failing to provide a means for a refund of those taxes to Tennessee consumers who bore the economic burden of the tax.

LIST OF ALL PARTIES

The parties to this proceeding are Lars M. Reimann and Woodson Tenent Laboratories, Inc. Although these parties maintain that they bring this suit on behalf of a class of persons and entities similarly situated, no court has addressed the propriety of a class action in this cause, and no class has been certified.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Lars M. Reimann and Woodson Tenant Laboratories, Inc. ("Petitioners") pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Tennessee, Western Section, which judgment

was denied a discretionary review by the Tennessee Supreme Court on March 28, 1994.

OPINIONS BELOW

The judgment of the Chancery Court of Shelby County, Tennessee, is unreported and is printed in the Appendix at A-1. The opinion of the Court of Appeals of Tennessee, Western Section is unreported and is printed in the Appendix at A-7.

JURISDICTION

The judgment of the Court of Appeals of Tennessee, Western Section was entered on December 10, 1993. Appendix at A-7. A timely Application for Permission to Appeal, filed in the Supreme Court of Tennessee, was denied by Order entered March 28, 1994. Appendix at A-14.

The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1257. Petitioners assert that the final judgment of the highest court of Tennessee in which a judgment could be had deprives Petitioners of procedural and substantive due process required under the fourteenth amendment to the United States Constitution. Petitioners further assert that the final judgment of the highest court of Tennessee in which judgment could be had decided a question of federal law under the fourteenth amendment in a manner that conflicts with prior decisions of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . . .

Appendix at A-15.

STATEMENT OF THE CASE

Petitioners paid sales tax on extended warranty contracts on vehicles. That tax was subsequently declared illegal by the Tennessee Supreme Court. See Covington Pike Toyota, Inc. v. Cardwell, 829 S.W.2d 132 (Tenn. 1992). Petitioners estimate that from January 1, 1989 through March 26, 1991 approximately 373,000 warranty contracts were sold in Tennessee resulting in approximately $24.8 million in illegally collected sales tax. Appendix at A-16.

This suit is not one in which taxpayers are asserting a general complaint about the manner in which their tax dollars are spent. The injury to these Petitioners, and to the class of individuals and entities whom these Petitioners seek to represent, is direct and easily calculated. There exists, therefore, a logical nexus between Petitioners' claimed due process violation and their rights as taxpayers to receive a refund of an illegally collected tax.

It is undisputed that the estimated $24 million in tax which the State of Tennessee collected was illegal. In Covington Pike Toyota, Inc. v. Cardwell, 829 S.W.2d 132 (Tenn. 1992), the Tennessee Supreme Court held that Tennessee state law did not authorize the collection of sales tax on extended warranty contracts sold to consumers when they purchased automobiles. Up until March 2, 1992, the date of the Covington Pike Toyota decision, Tennessee's position with regard to these taxes was that the State had the authority to collect the tax.

The sequence of events in this cause is crucial to a clear understanding of the inequitable conduct of the State of Tennessee with regard to the taxes at issue. On June 4, 1990, this Court unanimously decided in McKesson Corp. v. Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18, 39 (1990), that states must provide a clear and certain remedy for taxpayers to seek a refund of an illegally collected tax. On June 20, 1990, a trial court in Tennessee invalidated the State's practice of collecting sales tax on extended warranty contracts. While the trial court's decision was on direct appeal to the Tennessee Supreme Court, on March 26, 1991, the Tennessee legislature enacted Public Chapter 80 which (a) authorized sales tax on extended warranty contracts and (b) established a thirty-day limitation (expiring April 25, 1991) for any person to seek a refund of sales tax paid on extended warranty contracts. Appendix at A-24. Over eleven months later, on March 2, 1992, the Tennessee Supreme Court affirmed the trial court's holding that the sales tax on extended warranty contracts was unlawfully collected. Covington Pike Toyota, Inc. v. Cardwell, 829 S.W.2d 132 (Tenn. 1992).

By the time the Tennessee Supreme Court's Covington Pike decision was filed, no person or entity could obtain a refund of the illegal tax because the statute of limitation had already expired.

Public Chapter 80 provided:

> AN ACT To clarify the application of the sales and use tax t warranty or service contracts, to clarify the law in regard to refunds of taxes collected from customers, and to amend Tennessee Code Annotated, Sections 67-6-102 and 67-1-1803.
>
> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:
>
> SECTION 1. Tennessee Code Annotated, Section 67-6-102(22)(F), is amended by adding a new subdivision as follows:
>
> ( ) Charges for warranty or service contracts warranting the repair or maintenance of tangible personal property, provided that any repairs to the extent covered by the contract shall not also be subject to tax;
>
> SECTION 2. Tennessee Code Annotated, Section 67-

1-1802(a)(1), is amended by adding language at the end of the paragraph as follows:

Sales or use taxes which were collected from or passed on to customers by the taxpayer shall not be refunded unless the taxpayer has refunded or credited the sales or use tax to its customers.

SECTION 3. Notwithstanding the provisions of Tennessee Code Annotated, Section 67-1-1802, no sales or use tax paid prior to the effective date of this act with respect to charges for warranty or service contracts shall be refunded unless a properly documented refund claim was filed within thirty days after the effective date of this act.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or

> application, and to that end the provisions of this act are declared to be severable.
>
> SECTION 5. This act shall take effect upon becoming law, the public welfare requiring it. [Effective March 26, 1991.]

Appendix at A-24. The thirty-day limitation period set forth in Section 3 of Public Chapter 80 was never codified in the Tennessee Code. This thirty-day limitation period expired more than 10 months prior to the Tennessee Supreme Court's decision in Covington Pike Toyota invalidating the tax on extended warranty contracts. This Public Chapter exacerbated an already byzantine refund scheme which stands today in plain contravention of this Court's mandate of a clear and certain remedy expressed in McKesson Corp. v. Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18 (1990). The "remedy" expired before the right was created.

The special thirty-day limitation period applicable only to refund claims for tax paid on warranty contracts was not codified in the Tennessee Code and only appeared in the Compiler's Notes months after the new limitations period expired. Chapter 80, § 3 (not codified; see Compiler's Notes to Tenn. Code Ann. § 67-1-1802). Appendix at A-27. The Compiler's Notes containing this limitation state:

> **Compiler's Notes.** Acts 1991, Ch. 80, § 3 provided that, notwithstanding the provisions of this section, no sales or use tax paid prior to March 26, 1991, with respect to charges for warranty or service contracts shall be refunded unless a properly documented refund claim was filed within thirty days after March 26, 1991.

Appendix at A-29.

The time limitation in Chapter 80 substantially altered the normal procedure for obtaining a refund of illegally collected sales tax. Until Chapter 80 was enacted, a refund claim for wrongfully paid sales tax was considered timely under Tennessee law if filed within three (3) years from December 31 of the year in which the tax was paid. Tenn. Code Ann. § 67-1-1802(a). Appendix at A-27. As a result, the arbitrary reduction of a three-year statute of limitation to a thirty-day limitation period highlights the State of Tennessee's attempts to avoid refunding this tax to anyone.

Although the State of Tennessee gave no notice of Chapter 80's enactment, the State wasted no time notifying vendors that no refund of the tax was possible to them due to the thirty-day limitation period. Immediately following the Tennessee Supreme Court's decision in Covington Pike in March of 1992, the Tennessee Commissioner of Revenue, Joe Huddleston, mailed a letter to automobile dealers registered in the State of Tennessee:

Dear [Car Dealer],

I would like to take this opportunity to acquaint you with the opinions of the Department of Revenue on the findings in the Covington Toyota case.

When the statute was enacted, there was provided a thirty (30) day period from the date of its enactment on March 26, 1991, to allow dealers an opportunity to file a claim for refund of tax paid on the sale of such warranties. We will, therefore, honor only claims for refunds filed on or before April 25, 1991. In all cases prior to the dealer's claim being approved, they must satisfactorily show to the Department that the tax has been refunded to the customer.

The Department will require dealers eligible for refund consideration to submit a list of all parts and labor, provided under the terms of the warranty for which tax was refunded, and the tax will be due thereon. Dealers ineligible for a refund will not be liable for tax on repair parts and labor performed, provided tax was collected on the initial sale of the warranty.

Claim for refund made directly to the Department by the customer will not be honored.

> We believe that the opinions expressed are correct and are in keeping with the law, including the 1991 amendment and the recent court opinion.

Appendix at A-30. This letter clearly indicates that it is the State of Tennessee's position that unless an automobile dealer filed a claim for refund on or before April 25, 1991, then the automobile dealer would be ineligible to collect a refund of this tax. Additionally, this letter from the State of Tennessee states unequivocally that the consumer who bore the economic burden of the tax could not make a claim directly to the Tennessee Department of Revenue for recovery of that tax. This letter from Commissioner Huddleston highlights the inequity of the Tennessee tax refund scheme with regard to these illegal taxes and indicates that the State of Tennessee took the position that virtually no person or entity could properly bring a claim for a refund of any of the estimated $24 million of illegally collected tax.

Even though this Court directed in McKesson that a state must offer a taxpayer a clear and certain remedy to pursue a refund of illegally collected tax, the State of Tennessee has successfully to date avoided refunding millions of dollars it illegally collected. Attached in the Appendix at A-32 is a chart demonstrating that the Tennessee tax refund statutory scheme is a shell game. Whether the refund was sought by the consumer who bore the economic burden of the tax or by the automobile dealer who acted as the agent of the State in collecting and remitting the tax, the State of Tennessee has erected barriers which prevent the recovery of a refund. Unless

this Court intervenes, Tennessee will receive a windfall of over $24 million of illegal taxes to the State of Tennessee. In fact, Petitioners in this cause have been unable to determine under what circumstances any person or entity can obtain a refund of this tax on or after the date the Tennessee Supreme Court declared the tax illegal. Petitioners' counsel are aware of only six refund claims that were filed within Chapter 80's limitation period. All of those refund claims were denied by the Tennessee Department of Revenue, resulting in litigation with respect to each of those claims.[1] These cases, which are still pending in Tennessee courts, represent approximately $406,000.00, or 1.6%, of the estimated $24 million in illegally collected taxes. Petitioners challenge the State of Tennessee to explain to this Court how the remaining 98.4% of these illegally collected taxes can be refunded under present Tennessee law.

After the expiration of Chapter 80's absolute deadline, but within the regular three-year limitation period, Petitioners filed collective refund claims on behalf of themselves and others similarly situated, seeking a refund of the unlawfully collected taxes. Appendix at A-33. The Department of Revenue failed to respond to Petitioners' refund claims; Petitioners' refund claims, therefore, were deemed denied by operation of law. Tenn. Code Ann. § 67-1-1802(b). Appendix at A-28. Commissioner Huddleston's letter establishes that the

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[1] Petitioners believe that to date, the State of Tennessee has yet to refund any of the illegally collected taxes, even in the cases that were filed before Chapter 80's thirty-day deadline.

Department of Revenue denies all refund claims not filed within Chapter 80's thirty-day deadline.

On May 29, 1992, Petitioners, Lars M. Reimann and Woodson Tenant Laboratories, Inc., individually and on behalf of a class of persons and entities similarly situated, filed a Complaint for class action, for declaratory judgment and for money damages seeking a refund of the taxes collected from them by car dealers in the State of Tennessee on extended warranty contracts. Appendix at A-16. Despite the fact that Petitioners and others similarly situated were the consumers who bore the economic burden of the tax, the Commissioner of Revenue filed a Motion to Dismiss alleging that the Shelby County Chancery Court lacked subject matter jurisdiction to hear Petitioners' Complaint and further alleging that the case could not proceed as a class action. Appendix at A-42. After an Order was entered allowing Petitioners leave to file an Amended Complaint to allege federal substantive and procedural due process violations, the Shelby County Chancery Court granted defendant's Motion to Dismiss. A copy of the Order Granting the Motion to Amend and the Amended Complaint is attached in the Appendix at A-40. The Shelby County Chancery Court held that under Tenn. Code Ann. § 67-6-501, the Petitioners did not have "standing" to maintain

their action.[2] Appendix at A-1; A-47. The Court held that the car dealers that were the statutory collecting agents for the State were the proper parties to bring a claim seeking a refund of the tax. The Chancery Court chose not to address the issues of substantive and procedural due process violations raised in the Petitioners' Amended Complaint.

Petitioners filed a timely notice of appeal on February 3, 1993. On December 10, 1993, the Court of Appeals for the State of Tennessee, Western Section filed an opinion affirming the Chancery Court's dismissal of Petitioners' action. Appendix at A-7. The Court of Appeals affirmed the Chancery Court's decision, basing its conclusion upon the definition of "taxpayer" found in Tenn. Code Ann. § 67-6-501. The appellate court held that the proper party to seek a refund of the tax is the automobile dealer who was acting as the agent of the State in collection of the tax and remittance of that tax to the Department of Revenue. Appendix at A-13. The Court of Appeals further held that since the automobile dealers who collected the tax could pursue a refund of the

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[2] The decision of the Shelby County Chancery Court, affirmed by the Tennessee Court of Appeals, that Petitioners do not have "standing" is one based on statutory semantics. The trial court did not analyze the standing issue under this Court's test of standing under constitutional principles. See Lujan v. Defenders of Wildlife, __ U.S. __, 112 S. Ct. 2130 (1992). Rather, the "standing" determination was made based solely on the Tennessee legislature's definition of who constitutes a "taxpayer" for purposes of seeking a refund from the State. This, therefore, is not a standing case as that term is typically defined. It is a case to determine if the Tennessee statute defining taxpayer standing violates substantive and procedural due process in this case.

illegally collected tax under Tennessee law, there was no due process or McKesson violation in this cause. Appendix at A-12 - A-13.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE STATE OF TENNESSEE IS IN VIOLATION OF THIS COURT'S MANDATE IN McKESSON BY CREATING A TAX REFUND PROCESS THAT DENIES BOTH CONSUMERS AND VENDORS THE RIGHT TO A MEANINGFUL OPPORTUNITY TO OBTAIN A REFUND OF AN ILLEGAL TAX.

The issue presented to this Court concerns more than merely who is the proper party for purposes of a suit to collect a tax refund. Rather, a closer look at the Tennessee tax scheme with regard to extended warranty contracts shows that the laws of the State of Tennessee and the administrative steps taken by the Tennessee Department of Revenue effectively deny all taxpayers an opportunity to obtain a tax refund. Tennessee's administrative, legislative and judicial branches of government have steadfastly ignored this Court's admonition that states must provide a clear and certain remedy for tax refunds in order to comply with substantive and procedural due process requirements. McKesson Corp. v. Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18 (1990). The Tennessee Department of Revenue contends that the automobile dealer who merely collected and remitted the tax to the State is the proper party to seek a refund from the State, even though that dealer is required to refund that money to its customers first and, therefore, has little

incentive to file the claim. Further reducing the incentive of car dealers or consumers to file any claims for refund was the letter from the Tennessee Commissioner of Revenue putting Tennessee car dealers and consumers on notice that if they had not filed a refund claim before they received the letter, then they could not obtain a refund. Appendix at A-30. This letter served to chill, if not nullify, efforts by car dealers and consumers to seek a refund of the illegal tax.

Although the Tennessee Court of Appeals stated its belief that car dealers have an incentive to seek the tax refund from the State, the position of the State of Tennessee with regard to such claims is abundantly clear from Commissioner Huddleston's letter. Appendix at A-30. No dealer can timely file a claim for refund on behalf of its customers as the Tennessee Court of Appeals suggests because all dealers have been statutorily barred by Chapter 80's thirty-day limitation. The Tennessee Court of Appeals' solution, therefore, is not a viable remedy due to the State of Tennessee's bureaucratic shell game barring any refund of the estimated $24 million of illegal tax.

Tennessee's systematic obstruction of a refund of illegally collected taxes is in direct contravention of this Court's decision in McKesson, wherein this Court held that any state that does not provide a pre-deprivation hearing prior to the collection of a tax must provide a clear and certain remedy to obtain a tax refund from the state. 496 U.S. at 39. The rationale of the Tennessee Court of Appeals that the dealer has incentive to file a refund claim is illogical in view of the dealer's legal

obligation to refund this money to his customer. Tennessee even requires the dealer to refund the money to his customer before the dealer has standing to seek a refund from the State.

Furthermore, this Petition for Writ of Certiorari should be granted because the Tennessee Court of Appeals' decision in this case and its reliance on the Tennessee Supreme Court's decision in The Beare Company v. Olsen, 711 S.W.2d 603 (Tenn. 1986), is in direct contravention of this Court's holding in McKesson. The decision of the lower courts prohibiting the party who bore the economic burden of the tax from bringing suit to recover a refund contradicts the McKesson requirement of a clear and certain remedy for tax refunds and denies these Petitioners meaningful substantive and procedural due process.

The Tennessee courts, it is respectfully submitted, overlooked the real issue in this cause by holding that Petitioners do not have "standing" to file a refund claim for illegally collected taxes because Petitioners are not "taxpayers" as defined by Tenn. Code Ann. § 67-6-501. Petitioners concede that they are not "taxpayers" as defined in the Tennessee tax refund statute. Petitioners, however, contend that they are entitled to maintain this action notwithstanding the requirements of the Tennessee tax refund statute.

The central issue raised by Petitioners is that the Tennessee refund statute, as amended by Chapter 80 and enforced in the State of Tennessee, imposes unconstitutional barriers to all claims for refund of taxes

illegally collected on warranty contracts. The State of Tennessee has blocked both the vendors and the consumers from all avenues of meaningful relief for illegally collected taxes even though such action shuns this Court's pronouncement in McKesson Corp. v. Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18 (1990).

1. McKesson requires a clear remedy, and the Tennessee tax scheme fails to supply that remedy.

Exaction of a tax is a deprivation of property and is restrained by federal constitutional provisions. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida, 496 U.S. 18 (1990). Under the Due Process Clause of the United States Constitution, Petitioners are entitled to "a fair opportunity to challenge the accuracy and legal validity of their tax obligations [and] also a clear and certain remedy for any erroneous or unlawful tax collection to insure that the opportunity to contest the tax is a meaningful one." McKesson, 496 U.S. at 39.

In McKesson, the State of Florida enacted a liquor excise tax that unconstitutionally discriminated against interstate commerce by giving preference to citrus crops. The Florida Supreme Court invalidated the tax and awarded the plaintiff liquor distributor prospective relief by prohibiting future collection of the tax; the state court, however, refused to grant a refund of the tax previously paid by the liquor distributor. This Court held that since litigating "tax liabilities prior to payment might threaten a

government's financial security," a state need not provide pre-deprivation process for the exaction of taxes. McKesson, 496 U.S. at 37. When a state, however, chooses to require "taxpayers to raise their objections to the tax in a post-deprivation refund action," then

> [t]o satisfy the requirements of the Due Process Clause, . . . the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

McKesson, 496 U.S. at 38-39. This Court, therefore, reversed the Florida Supreme Court and required the State of Florida to refund the taxes.

McKesson teaches that the state cannot keep the taxes just because a remedy is difficult to fashion. Petitioners submit that the remedy of suing automobile dealers for a refund of the taxes is no remedy at all, since the Department indicated that it will deny all refund claims filed after Chapter 80's thirty-day deadline. Appendix at A-30. The Department requires that before a dealer can file a sales tax refund claim, the dealer is required to refund the sales tax to the consumer, Tenn. Code Ann. § 67-1-1802(a)(1). Appendix at A-27. Moreover, only after dealers spend their own money to refund the sales tax to consumers can they file a refund claim. Given that the Commissioner routinely denies

dealers' refund claims based on Chapter 80's thirty- day limitation period, no dealer would refund money to the consumer knowing that the dealer's own refund claim will be denied. By the time the dealer's customer learned that the Tennessee Supreme Court had held the tax illegal, the customer's dealer may have become insolvent or ceased to exist.

Furthermore, the Tennessee Department of Revenue unconstitutionally imposed additional burdens upon automobile dealers seeking tax refunds on extended warranty contracts. The letter from Commissioner of Revenue Joe Huddleston evidences the Department's attempt to hinder claims for refunds of sales tax paid on warranty contracts. Appendix at A-30. The Commissioner's letter first recites Chapter 80's requirement that only claims filed within the thirty day window would be approved. The letter then adds Chapter 80's second requirement, that any refund claims made by an automobile dealer must contain proof that the automobile dealer has refunded the tax to the customer. Appendix at A-30. The Commissioner's letter then delineates a third requirement, not found anywhere in the tax refund statutes, that any "dealers eligible for refund consideration [must] submit a list of all parts and labor, provided under the terms of the warranty for which tax was refunded, and the tax will be due thereon." Appendix at A-30. This is another costly, time-consuming barrier added by the Commissioner to hinder this class of claimants from receiving a refund of taxes unlawfully collected by the State of Tennessee. Not only did the Commissioner erect barriers to automobile dealers' refund claims, the Commissioner's letter states plainly that it is

useless for customers who paid the tax to seek a refund. The Commissioner's letter expressly states that a "[c]laim for refund made directly to the Department by the customer will not be honored." Appendix at A-30. Such deliberate efforts to prevent the refund of these unlawfully collected taxes tainted the refund process by denying both consumers and vendors the opportunity to obtain a refund of illegally collected tax, and violates the mandate of this Court in McKesson.

2. Petitioners are the real parties in interest, and, therefore, due process requires that they have standing to proceed in this cause.

Petitioners contend that they have the right to seek a tax refund directly from the State of Tennessee under the McKesson due process requirement of "a clear and certain remedy." McKesson, 496 U.S. at 39. The State of Tennessee should not be allowed to disguise its failure to provide the constitutionally mandated "clear and certain remedy" by arguing that the Petitioners, who bore the economic burden of the tax, are not "taxpayers." This is especially true where the Tennessee Department of Revenue has imposed a scheme which prevents the recovery of the illegally collected taxes by anyone, thereby negating any remedy for the refund of the taxes illegally collected on extended warranty contracts, much less a clear and certain one. Petitioners, therefore, as the individuals who bore the economic burden of the tax, should have the right to pursue this claim directly against the State that taxed them in the first place.

Petitioners in this cause satisfy this Court's three-part test for standing as set forth in Lujan v. Defenders of Wildlife, ____ U.S. ____, 112 S. Ct. 2130 (1992). In Lujan, this Court stated that under constitutional standing analysis, a plaintiff:

> must have suffered an injury in fact--an invasion of a legally-protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical, . . . Second there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 112 S. Ct. at 2136.

Petitioners in this cause satisfy all three prongs of this Court's test for standing. First, the Petitioners were injured in fact when they paid a tax to the State of Tennessee that was subsequently declared illegal. In that respect, the injury is concrete, particularized and actual. Moreover, Petitioners complain that the State has established a statutory tax refund scheme that prevents anyone from obtaining a tax refund. Their injury, payment of the tax, is causally related to Tennessee's

failure to provide a clear and certain remedy for a refund in violation of substantive and procedural due process. Additionally, Petitioners' injury will be redressed by a favorable decision of this Court mandating that McKesson's clear and certain remedy requirement be enforced so that these Petitioners may pursue a class action claim directly against the State.

In this case, the consumers who bore the economic burden of the tax are the real parties in interest and have the paramount incentive in continuing to challenge every barrier erected by the State of Tennessee to a tax refund. Automobile dealers, because they are required by Tennessee law to refund the tax to the consumers who bore the economic burden of the tax, do not have any incentive to pursue costly litigation. Although there is a possibility that consumers may bring suit against the automobile dealer to recover the amount of tax that the automobile dealer collected from them, the dealers that the consumers would be required to file suit against may not exist or be solvent by the time the consumer seeks a refund. In any event, that suit would not result in a refund of the monies from Tennessee because the dealers are barred, too.

The personal stake of each individual taxpayer is approximately $50.00. It is, therefore, not cost efficient for each taxpayer separately to bring a complaint for refund against the dealer. Rather, the proper mechanism and the most efficient manner in which these Petitioners can obtain their refund is to allow a class action by these Petitioners to proceed against the Tennessee Department of Revenue, thereby removing the collecting agent of the

State from the refund process. McKesson mandates such a remedy, and Petitioners urge this Court to grant this Petition for Writ of Certiorari in order to allow Petitioners' relief.

3. The State of Tennessee will receive a multi-million dollar windfall from its unlawful exaction of a tax unless this Court requires Tennessee to provide a remedy.

Petitioners submit that unless this Court allows this action to proceed, there is no remedy which satisfies the McKesson test for anyone to recover a refund of Tennessee's unlawful exaction of sales tax on warranty contracts. No matter what route they take, consumers, as well as automobile dealers, meet an administrative dead end, either because they are not "taxpayers" or because they failed to be clairvoyant enough to file a refund claim eleven months before the Tennessee Supreme Court declared the tax illegal.

Additionally, the requirement that a consumer sue a dealer to obtain a refund of the tax results in the tax liability falling on the automobile dealer and allows the State of Tennessee to reap the benefits of its unlawful tax collection. This is because dealers who file refund claims now are outside of Chapter 80's thirty-day window, and in fact have been outside of Chapter 80's thirty-day window for the entire time that the right to the refund of the taxes has existed. The State, therefore, in direct contravention of the requirements set forth in McKesson, would be allowed a windfall of all of the illegal taxes collected on extended warranty contracts due to the expiration of

Chapter 80's thirty-day limitation. If consumers filed suit against the dealer to collect a refund of the taxes, the dealer would suffer the loss because the dealer is unable to recover that money from the State, and the State of Tennessee would remain $24 million richer through unlawful tax collection. The Department of Revenue's argument throughout this case, therefore, that these consumers are not the "taxpayers" and cannot bring the suit, is a procedural attempt to mask its underlying scheme to prevent a refund of any of these illegally collected taxes from the State treasury. That result is precisely what McKesson determined should not occur. Otherwise, states would be encouraged to collect legally questionable taxes.

If this Court agrees with the Tennessee Court of Appeals that these consumers are not the proper taxpayers in this case and, therefore, cannot proceed with this action, then the real possibility exists that the Tennessee Department of Revenue will never refund the lion's share of the $24 million of illegally collected tax to anyone.

This Court in McKesson noted that when a state assesses taxes which it is without authority to collect, the state has no "choice but to 'undo' the unlawful deprivation by refunding the tax" in order to comply with the fourteenth amendment to the United States Constitution. McKesson, 496 U.S. at 39. This policy is sound because it removes any incentive that a state may have to collect legally questionable taxes. Tennessee's blocking of all attempts to collect a refund of the illegal tax on extended

warranty contracts, therefore, violates due process principles and subverts this Court's directive in McKesson.

4. The Tennessee Court of Appeals relied upon a decision of the Tennessee Supreme Court that pre-dates McKesson and contradicts the requirements of McKesson.

This Writ of Certiorari also should be granted because the Tennessee Court of Appeals relied upon a Tennessee decision which pre-dates McKesson and is contrary to McKesson. The Court of Appeals' opinion in this case indicates that the Tennessee Court of Appeals considered itself bound by the Tennessee Supreme Court's decision in The Beare Co. v. Olsen, 711 S.W.2d 603 (Tenn. 1986). The Court stated:

> It is the duty of the Court of Appeals to apply the law as promulgated by the legislature, or as announced by the Supreme Court. This Court is bound by the decisions of the Supreme Court under the doctrine of stare decisis. In no way is it the function of this Court to intentionally overrule a holding of the Supreme Court. The question of standing was resolved by our Supreme Court in Beare Co. v. Olsen, supra, and that decision is controlling here.

Appendix at A-13.

In Beare, a consumer sued both the vendor/municipal utility company that collected the sales tax and the Department of Revenue to obtain a sales tax refund. The Tennessee Supreme Court stated that "the legal incidence of the tax is on the vendor of the taxable services" and "just because provision is made to pass the tax on to the consumer does not alter the fact that the tax itself is imposed on the seller." Beare, 711 S.W.2d at 605 (citation omitted). Accordingly, the Tennessee Supreme Court held in Beare that only the vendor had standing to bring a refund action against the Department of Revenue.

The Tennessee Supreme Court's decision in Beare contained a superficial analysis of due process requirements in tax refund cases. The Court stated:

> The plaintiff argues that it would be denied due process of law if it did not have standing to sue under the circumstances presented here. This is apparently based upon the premise that the plaintiff would have no remedy otherwise. The plaintiff has the same remedy available to it that all consumers have concerning a billing complaint with a public utility, i.e., payment of the amount demanded under protest and suing the utility for recovery. But in this case, the plaintiff does not seek recovery from the City, rather instead the plaintiff seeks to recover from the State. The City was sued but on the theory that plaintiff was a taxpayer and the City was a collecting agent for the State. We have pointed out

> that this theory is erroneous. No judgment was sought or obtained against the City. Certainly a procedure is available under our Rules of Civil Procedure that would allow the plaintiff to sue the City with the City having a corresponding claim against the State, assuming the City upon whom the tax has been levied, has otherwise complied with the payment under protest statutes. Plaintiff apparently argues that such a procedure is cumbersome, but if such argument be accepted it would not result in a denial of due process. (No citations omitted.)

Beare, 711 S.W.2d at 606.

Petitioners submit that McKesson now requires a more significant due process analysis than was undertaken in the Beare case. In Beare, the Court concluded that because the plaintiff had a direct action against the utility company, then all due process considerations had been satisfied. That, however, is not the case in this action in light of the provisions of Public Chapter 80.

In the present case, if the consumers file suit against the car dealers who collected the tax from them, the car dealers would have no action against the State for a refund of the unlawfully collected taxes because Chapter 80's thirty-day limitation period has expired. As a result, in order to satisfy due process mandates, and in order for the real party in interest who bore the economic burden of the tax to be able to recover a refund from the entity

that is holding that unlawful tax, the present action must be permitted to proceed. Otherwise, car dealers would be compelled to pay the tax refund to the consumers from their own pockets, and the State of Tennessee would retain a $24.8 million benefit from illegal tax collection. Neither McKesson nor due process principles tolerate such a result.

Furthermore, in Beare the Tennessee Supreme Court determined that just because a refund procedure is cumbersome it does not result in a denial of due process. In the present case, however, the Tennessee tax refund scheme is so convoluted as to result in a denial of due process to any party attempting to obtain a refund of the tax from the State. In this case, the State of Tennessee is retaining the benefit of exceeding its taxing power and, furthermore, is receiving a multi-million dollar windfall like that expressly forbidden by this Court in McKesson.

This Court's decision in McKesson, rendered four years after Beare but one year before Chapter 80 was enacted in Tennessee, establishes a procedural due process standard that is not satisfied by Beare, nor by the disallowance of the claims of consumers who paid the tax. In McKesson, this Court held that where a state requires payment of a tax before the tax can be challenged, the Due Process Clause of the United States Constitution requires that the state offer an opportunity to challenge the validity of the tax and a clear and certain remedy for refund of the tax. McKesson, 496 U.S. at 39. Beare's holding is that only vendors may seek a tax refund. If McKesson means what it says, the result in Beare denying the person who bore the economic burden of the tax from

seeking a refund from the State can no longer be tolerated.

CONCLUSION

For the foregoing reasons, Petitioners urge this Court to grant this Petition for a Writ of Certiorari in order to compel the State of Tennessee to adhere to this Court's mandates established in McKesson.

Respectfully submitted,

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APPENDIX

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC., individually and on behalf of a class of persons and entities similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No.: 101490-2(1)
JOE HUDDLESTON, in his capacity as Commissioner of Revenue for the State of Tennessee,	)	
Defendant.	)	

ORDER AND JUDGMENT

This matter is before this Court upon the Defendant Commissioner of Revenue's motion to dismiss the Complaint, as amended, filed by the Plaintiffs Lars M. Reimann and Woodson Tenent Laboratories, Inc.,

individually and on behalf of a class of persons and entities similarly situated. The Defendant seeks to dismiss the Plaintiffs' Complaint, as amended, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Tennessee Rule of Civil Procedure 12.02(1) and (6). Upon consideration of this motion, the briefs of the parties, the argument of the parties at the hearing held on November 20, 1992, and the entire record, and for the reasons set forth in a Memorandum Opinion filed contemporaneously herewith, this Court hereby ORDERS, ADJUDGES and DECREES that the Defendant's motion to dismiss the Complaint, as amended, is hereby GRANTED and this Complaint, as amended, is hereby DISMISSED. The Court further ORDERS that all costs are taxed to the Plaintiffs for which judgment may issue.

IT IS, THEREFORE, SO ORDERED.
Entered this 15 day of January, 1993.

/s/_____
CHANCELLOR

SUBMITTED FOR ENTRY BY:

CHARLES W. BURSON
Attorney General and Reporter

/s/
WILLIAM E. YOUNG (#9711)
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-1902

Counsel for Defendant

/s/
LYDIA A. BABAROGH
Chancery Court
Jan. 15, 1993

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC., et al,	)	
Plaintiffs,	)	
v.	)	NO.: 101490-2(1)
JOE HUDDLESTON, Commissioner of Revenue for the State of Tennessee,	)	
Defendant.	)	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter came to be heard on defendant Commissioner of Revenue's motion to dismiss plaintiff's complaint for class action and for declaratory judgment and for money damages.

As a result of the plaintiff's request, the Court submits the following written Findings of Facts and Conclusions of Law.

After having considered the briefs filed in this matter, oral arguments of counsel, and the entire record in this case, the Court finds as follows:

That under Tennessee Rule of Civil Procedure 67-6-501 et seq. and a number of Supreme Court decisions, the vendor, not the vendee is the taxpayer and the consumer vendee can not maintain an action to recover State sales tax even though he ultimately absorbed their costs. If a claim is to be made against the State for a sales tax refund and/or a lawsuit filed, the selling dealer is the proper party to initiate such action and both sides confirm that such a case is presently pending on this very question in Nashville. If a consumer has been improperly charged for taxes by the dealer, then the consumer's remedy is with the dealer.

Even if plaintiffs had standing, this Court is unable to find authority to authorize a class action remedy in tax claim cases.

This Court, therefore, finds that the plaintiffs lack standing to bring this action and this Court lacks jurisdiction to hear it.

Other points were urged upon the plaintiffs but having reached the above findings, the Court will not deal with the other points at this time. This hearing was held

on a motion to dismiss and, therefore, no testimony or proof was received and all the points raised by the plaintiffs are incorporated in their complaint and briefs.

This Court finds that the plaintiffs lack standing to bring this action and the Court lacks jurisdiction to hear it.

The order will be prepared accordingly.

/s/_____
C. Neal Small, Chancellor

DATE: 1-15-93

/s/_____
Lydia A. Babarogh
Chancery Court Jan. 15, 1993

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

LARS M. REIMANN and
WOODSON TENENT
LABORATORIES, INC.,

Plaintiffs-Appellants,

Vs.

JOE HUDDLESTON, in his
capacity as Commissioner
of Revenue for the
State of Tennessee,

Defendant-Appellee

Appellate Court Clerk
Jackson

C.A. No.
02A01-9302-CH-00027

FROM THE CHANCERY COURT
OF SHELBY COUNTY
THE HONORABLE NEAL SMALL, CHANCELLOR

AFFIRMED AND REMANDED

OPINION FILED: DEC 10 1993

CRAWFORD, J.
TOMLIN, P.J., W.S., Not Participating
CONCUR:
HIGHERS, J.

This is a suit for recovery of sales taxes paid on extended warranty contracts for motor vehicles. In *Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132 (Tenn. 1992), our Supreme Court held that such extended warranty contracts were not subject to sales tax under T.C.A. § 67-6-102 (22)(F)(iv) and (vi) (1983 & Supp. 1987).[1]

Plaintiffs, Lars M. Reimann and Woodson Tenent Laboratories, Inc., individually and on behalf of a class of persons and entities similarly situated, brought suit to recover amounts paid as sales taxes in connection with the purchase of extended warranty contracts on motor vehicles for the period from January 1, 1989 to March 26, 1991. Plaintiffs also sought a declaratory judgment that Chapter 80, section 3, of the 1991 Tennessee Public Acts was unconstitutional under the Tennessee and United States Constitutions because it limited the amount of time in which a taxpayer could file a claim for a refund of sales taxes paid on warranty contracts to within thirty days of March 26, 1991.[2]

In response, the Commissioner of Revenue filed a motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The chancellor concluded that plaintiffs

---

[1] The Retailer's Sales Tax Act was amended, effective March 26, 1991, to expressly make "[c]harges for warranty or service contracts" taxable. *See* T.C.A. § 67-6-102 (22)(F)(ix) (Supp. 1993).

[2] This act in effect allowed only a thirty day window within which to file all claims for refunds for sales taxes on warranty contracts improperly collected. After the expiration of this time, all such claims were barred.

lacked standing to bring the suit and on January 15, 1993, entered an order of dismissal. There was no class certification pursuant to Tenn.R.Civ.P. 23.01. Plaintiffs have appealed and present four issues for review. However, we perceive the determinative issue to be whether the chancellor erred in dismissing the suit for lack of standing.

The Retailer's Sales Tax Act, codified at T.C.A. § 67-6-101 to 67-6-712 (1989 & Supp. 1993), imposes a tax on retail sales. T.C.A. § 67-6-501 clearly states that the seller or "dealer making sales . . . or furnishing any of the things or services taxable . . . *shall* be liable for the tax imposed. . . . " (emphasis added). T.C.A. § 67-6-502 mandates that the tax "shall be collected by the retailer from the consumer insofar as it can be done." Thus, T.C.A. § 67-6-501 places the legal incidence of the sales tax upon the seller, not the consumer, but T.C.A. § 67-6-502 requires the seller to collect the tax from the consumer. *Beare Co. v. Olsen,* 711 S.W.2d 603 (Tenn. 1986); *Carey Lumber v. Sixty-One Cabinet Shop,* 773 S.W.2d 252 (Tenn. App. 1989).

In *Beare,* the Tennessee Supreme court held that under the refund statutes applicable at that time, a consumer who paid the sales tax to a dealer or retailer did not have standing to sue the state for a refund of the taxes. The Court said:

> The statutory provisions regarding the recovery of tax payments are clearly intended for the taxpayer's benefit. No provision is made for suit by a person upon

> which the incidence of the tax may ultimately fall.

711 S.W.2d at 605.

The present refund statute, T.C.A. § 67-1-1802, specifically provides for a refund to "taxpayers" and likewise makes no provision "for suit by a person upon which the incidence of the tax may ultimately fall." A suit for a refund of taxes is a suit against the state, which may be maintained only in the manner and form consented to by the state. Tenn. Const. Art. I, Sec. 17; *Lyons v. Lay*, 179 Tenn. 388, 166 S.W.2d 778 (1942). Plaintiffs assert that because the refund statute, T.C.A. § 67-1-1802, allows only the taxpayer (the retailer or vendor) to claim a refund and not the consumers who bear the actual burden of the tax, they are unconstitutionally deprived of a remedy for the unlawful exaction of the sales tax on warranty contracts.

The plaintiff/consumer in *Beare* made this same argument, and in response thereto, the Court said:

> The plaintiff argues that it would be denied due process of law if it did not have standing to sue under the circumstances presented here. This is apparently based upon the premise that the plaintiff would have no remedy otherwise. The plaintiff has the same remedy available to it that all consumers have concerning a billing complaint with a public utility, i.e., payment of the amount demanded under protest and

> suing the utility for recovery. But in this case, the plaintiff does not seek recovery from the City, rather instead the plaintiff seeks to recover form the state. The City was sued but on the theory that plaintiff was a taxpayer and the City was a collecting agent for the State. We have pointed out that this theory is erroneous. No judgment was sought or obtained against the City. Certainly a procedure is available under our Rules of Civil Procedure that would allow the plaintiff to sue the City with the City having a corresponding claim against the State, assuming the City upon whom the tax has been levied, has otherwise complied with the payment under protest statutes. Plaintiff apparently argues that such a procedure is cumbersome, but if such argument be accepted it would not result in a denial of due process.

Beare, 711 S.W.2d at 606.

Plaintiffs also argue that dealers have no incentive to sue for the recovery of the taxes. We must respectfully disagree. The state aptly responded to this argument in its brief, which we now adopt:

> The argument by the Plaintiffs that the dealers have no incentive to sue for the recovery of such taxes is disingenuous. The motive for dealers to bring such lawsuits would include avoidance of litigation by

> their customers to recover such taxes. Moreover, as recognized by the Legislature, dealers and vendors are in a better position to bring such lawsuits that are consumers who may ultimately bear the economic consequences of the tax. Dealers maintain the records connected with the sales that bear these taxes, **see** T.C.A. § 76-6-523, and since dealers handle a volume of sales they can file a single refund claim on a number of sales whereas an individual consumer would usually file a claim for taxes paid on one or two purchases, see T.C.A. § 67-1-1802. Indeed, given the small amounts that an individual consumer could claim as a refund, it is the consumer and not the dealer who would have the financial disincentive to pursue such a claim for refund.

We also note that the dealer's incentive should have no effect on a consumer's cause of action against the dealer for illegally collected taxes.

Finally, plaintiffs assert that the refund statute denies them due process because they have no opportunity to challenge the legal validity of the tax collected. Plaintiffs argue that they are entitled to "a fair opportunity to challenge the accuracy and legal validity of their tax obligation, [and] also a 'clear and certain *remedy*' . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *McKesson v. Div. of Alcoholic Beverages and*

Tobacco, 496 U.S. 18, 39, 110 S.Ct. 2238, 2251, (1990) (citations omitted) (emphasis added).

We must respectfully disagree with plaintiffs' assertion. *McKesson* deals with a *taxpayer's* refund. It is the taxpayer who must be afforded the opportunity to challenge the validity or legality of the tax; the consumer's remedy is against the taxpayer, here, the vendor of the warranty contracts, to recover the amounts paid.

It is the duty of the Court of Appeals to apply the law as promulgated by the legislature, or as announced by the Supreme Court. This Court is bound by the decisions of the Supreme Court under the doctrine of *stare decisis*. In no way is it the function of this Court to intentionally overrule a holding of the Supreme Court. The question of standing was resolved by our Supreme Court in *Beare Co. v. Olsen, supra*, and that decision is controlling here.

Accordingly, the order of the trial court dismissing plaintiffs' suit is affirmed and costs of the appeal are assessed against the appellants. The case is remanded to the trial court for such further proceedings as may be necessary. Since our decision on this issue is determinative, we pretermit consideration of the other issues presented for review.

[SIGNED]
CRAWFORD, J.

TOMLIN, P.J., W.S., Not Participating

CONCUR:
[SIGNED]
HIGHERS, J.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC.,	)	
Appellant,	)	Shelby Chancery
VS.	)	No. 02A01-9302-CH-00027
JOE HUDDLESTON, in his capacity as Commissioner of Revenue for the State of Tennessee,	)	
Appellee.	)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion the application should be denied.

PER CURIAM

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC., individually and on behalf of a class of persons and entities similarly situated,	)	
Plaintiffs,	)	
v.	)	No. _____
JOE HUDDLESTON, in his capacity as Commissioner of Revenue for the State of Tennessee,	)	
Defendant.	)	

COMPLAINT FOR CLASS ACTION AND
FOR DECLARATORY JUDGEMENT AND
FOR MONEY DAMAGES

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE:

Comes now Lars M. Reimann and Woodson Tenent Laboratories, Inc, by and through their attorneys of record, and for their cause of action would state and show unto this honorable Court as follows:

1. Plaintiff Lars M. Reimann is a resident of Shelby County, Tennessee. Plaintiff Woodson Tenent Laboratories is a Tennessee corporation with its principle place of business in Shelby County, Tennessee. Plaintiffs bring this action on their behalf and on behalf of all similarly situated taxpaying individuals and entities as described hereafter.

2. Defendant is the Commissioner of Revenue of the State of Tennessee.

3. Plaintiff alleges that this court has jurisdiction over this matter pursuant to Tenn. Code Ann. 67-1-1801(b).

4. Plaintiffs paid sales tax in connection with purchases of extended warranty contracts on motor vehicles.

5. The sales tax paid by Plaintiffs was illegally and improperly collected by Defendant inasmuch as the taxing statute relied upon by Defendant has been held by the Tennessee Supreme Court in the case of Covington Pike

Toyota, Inc. v. Cardwell, March 2, 1991, not to authorize the collection of such a tax.

6. Collection of the tax from similarly situated taxpayers is illegal; moreover, collection of the tax from non-resident taxpaying entities constitutes an impermissible burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution.

CLASS ACTION

7. Description of class: Plaintiffs in this class action are taxpaying individuals and entities, both residents and non-residents, who paid sales tax on the purchase of extended warranty contracts in connection with the purchase of a motor vehicle in the State of Tennessee. Members of this class include purchasers of automobiles who paid sales tax on an extended warranty contract during the period January 1, 1989 through March 26, 1991, and sellers of automobiles who remitted tax to the State of Tennessee without collecting the tax from their customer.

8. In accordance with Rule 23.01 of the Tennessee Rules of Civil Procedure, Plaintiff alleges that this action is maintainable as a class action because (1) the class is so numerous that the joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

9. This action is maintainable as a class action because in addition to the pre-requisites of T.R.C.P. 23.01, the requirements of T.R.C.P. 23.02 are satisfied. Specifically, the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. Class members are located throughout the State of Tennessee and elsewhere and separate actions would create a risk of inconsistent or varying adjudications.

10. Alternatively, adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of other members, particularly those located in the same jurisdiction, even though those other members of the class are not parties to the adjudication, adjudications in one jurisdiction would substantially impair or impede their ability to protect their interests.

11. Defendant in this cause of action has acted on grounds generally applicable to the class by illegally collecting a tax on sales of extended warranty contracts on motor vehicles in the State of Tennessee. There are questions of law and fact common to the members of the class which predominate over any questions affecting only individual members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. In fact, a class action may be the only feasible and practical method for the fair and efficient adjudication of the controversy. Each member of the class paid a similar tax in connection with the purchase of an

extended warranty relating to the purchase of a motor vehicle. Each member of the class paid a tax improperly and illegally collected.

12. Plaintiff and each member of the class is entitled to a refund of the sales tax paid in conjunction with the purchase of the extended warranty.

13. Plaintiffs just damages will depend upon reliable statistical proof, however, based upon the number of vehicles registered in the State of Tennessee for the applicable period, the percentage of sales involving the purchase of warranty contracts, and the average tax paid upon each contract, damages in this cause will be in excess of Twenty-Five Million dollars ($25,000,000.00).

DECLARATORY JUDGEMENT ACTION

14. Plaintiff anticipates that Defendant, in defending against this class action, will rely upon Public Chapter No. 80 of the Public Acts of the State of Tennessee of the 1991 session of the General Assembly. This Public Act is an apparent attempt to amend Tenn. Code. Ann. 67-1-1802. Section 3 of this Public Act provides:

> Notwithstanding the provisions of Tennessee Code Annotated, Section 67-1-1802, no sales tax or use tax paid prior to the effective date of this act with respect to charges for warranty or service contracts shall be refunded unless a properly documented refund claim was filed within

thirty days after the effective date of this act.

15. Plaintiffs seek a declaration from this Court that this Public Act violates the Due Process Clause of the United States Constitution as well as Article One, Section Twenty of the Constitution of the State of Tennessee.

16. This Public Act is unenforceable and cannot be used by Defendant as a bar to recovery by the class described herein, for the additional reason that the caption and language of the Act is misleading and the amendment itself has not been codified. Since this Public Act did not even appear in the Tennessee Code Annotated until after the limitation period contained therein expired, enforcement of this Public Act would violate the Due Process Clause of the United States Constitution and Article I, Section 20 of the Constitution of the State of Tennessee.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Court:

1. Determine that this action may be maintained as a class action; and

2. Determine and direct the best notice practicable to the members of the class under the circumstances, including publication if found to be appropriate or individual notice to all members who can be identified through reasonable effort; and

3. Advise each member that the Court will exclude them from the class if so requested by a specific date; and

4. Direct any other required notices as outlined in T.R.C.P. 23.03(2); and

5. Declare Public Chapter No. 80 of the 1991 Public Acts unconstitutional and/or unenforceable; and

6. Grant a judgment in this cause of action favorable to the class and enter an order including and describing those whom the Court finds to be members of the class in accordance with T.R.C.P. 23.03(3); and

7. Enter such other orders in accordance with T.R.C.P. 23.04 as this Court may find appropriate; and

8. Award Plaintiffs and the class such other relief, both general and specific, as this Court may find appropriate.

Respectfully submitted,

/s/_____

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(901) 526-2000
Tenn. Disc. Bd. No. 324

/s/_____

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OF COUNSEL:
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Williams & Kirsch
2000 First Tennessee Building,
Memphis, Tennessee 38103

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 80
SENATE BILL NO: 1391

By Darnell

Substituted for: House Bill No. 1263

By Purcell, Ridgeway, Crain, DeBarry, Pinion, Johnson, Rinks, Bragg, Kisber, Turner (Hamilton), Rhinehart

AN ACT To clarify the application of the sales and use tax to warranty or service contracts, to clarify the law in regard to refunds of taxes collected from customers, and to amend Tennessee Code Annotated, Sections 67-6-102 and 67-1-1803.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 67-6-102(22)(F), is amended by adding a new subdivision as follows:

( ) Charges for warranty or service contracts warranting the repair or maintenance of tangible personal property, provided that any repairs to the extent covered by the contract shall not also be subject to tax;

SECTION 2. Tennessee Code Annotated, Section 67-1-1802(a)(1), is amended by adding language at the end of the paragraph as follows:

> Sales or use taxes which were collected from or passed on to customers by the taxpayer shall not be refunded unless the taxpayer has refunded or credited the sales or use tax to its customers.

SECTION 3. Notwithstanding the provisions of Tennessee Code Annotated, Section 67-1-1802, no sales or use tax paid prior to the effective date of this act with respect to charges for warranty or service contracts shall be refunded unless a properly documented refund claim was filed within thirty days after the effective date of this act.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect upon becoming law, the public welfare requiring it.

SENATE BILL NO. 1391

PASSED: March 18, 1991

/s/ _____
JOHN S. WILDER,
SPEAKER OF THE SENATE

/s/ _____
JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 26th day of March 1991

/s/ _____
NED McWHERTER, GOVERNOR

67-1-1802. Refunds.--(a)(1) The commissioner of revenue, with the approval of the attorney general and reporter, except as provided in subdivision (a)(4), is empowered and directed to refund to taxpayers all taxes collected or administered by the commissioner that are, on the date of payment, paid in error or paid against any statute, rule, regulation or clause of the constitution of this state or of the United States. Such refunds shall include, but not be limited to, credit carryovers generated after an audit review of returns, reports, or other documents filed by the taxpayer, including amendments thereto. Such refunds do not, however, include credits generated by mechanical processing or mechanical mathematical verification processes. The authority granted in this subdivision extends only to taxes for which a claim is filed, with the commissioner under oath and supported by proper proof, within three (3) years from December 31 of the year in which the payment was made. The entire disputed amount of tax, penalty and interest must be paid before any claim for refund thereof can be filed. Sales or use taxes which were collected from or passed on to customers by the taxpayer shall not be refunded unless the taxpayer has refunded or credited the sales or use tax to its customers.

(2) The commissioner is authorized to make refunds without a claim being filed if the commissioner is in possession of proper proof and facts that a refund is due within three (3) years from December 31 of the year in which the payment was made.

. . .

(7) A refund which is authorized solely by a final court adjudication shall not be made to any person who is not

either a party to such action or a party to another similar action.

(8) In any case in which the statute of limitations on the assessment of tax is extended by agreement in writing pursuant to § 67-1-1501(b)(5), the periods specified in this subsection which limit the ability of the commissioner to refund taxes may also be extended for an equivalent period of time by agreement in writing entered into by the commissioner or the commissioner's delegate and the taxpayer.

(b)(1) All claims for refund filed pursuant to this section shall be finally determined within six (6) months following receipt of the claim. If the claim for refund is denied, the commissioner shall promptly notify the claimant of the denial, and of the claimant's right to file a suit for refund in the appropriate chancery court in this state within six (6) months from the date of denial.

(2) If a claim is not determined within the six-month period following receipt by the commissioner of such claim, the claim shall be deemed to be denied for the purpose of filing suit in chancery court.

(c)(1) Upon denial by the commissioner of a claim for refund, or upon the expiration of the six-month period following receipt by the commissioner of the claim, whichever occurs first, the taxpayer may file suit against the commissioner with six (6) months in the appropriate chancery court of this state for a refund. The chancery court shall conduct a de novo trial of the suit.

(2) The commissioner, by written notice promptly delivered to the taxpayer, may waive the requirement that the taxpayer file a claim for refund, in which case the taxpayer may file suit in the appropriate chancery court of this state for a refund within six (6) months following the

date of such waiver by the commissioner, and such suit shall proceed in all respects (including for the purpose of determining the date from which interest thereon should be calculated) as if proper and timely claim for refund had been filed by the taxpayer and either denied or not acted upon by the commissioner within the period specified herein.

Compiler's Notes. Acts 1991, ch. 80, § 3 provided that, notwithstanding the provisions of this section, no sales or use tax paid prior to March 26, 1991, with respect to charges for warranty or service contracts shall be refunded unless a properly documented refund claim was filed within thirty days after March 26, 1991.

STATE OF TENNESSEE
DEPARTMENT OF REVENUE
ANDREW JACKSON STATE OFFICE BUILDING
NASHVILLE, TENNESSEE 37242

_____, 1992

Dear _____

I would like to take this opportunity to acquaint you with the opinions of the Department of Revenue on the findings in the Covington Toyota case.

When the statute was enacted, there was provided a thirty (30) day period from the date of its enactment on March 26, 1991, to allow dealers an opportunity to file a claim for refund of tax paid on the sale of such warranties. We will, therefore, honor only claims for refunds filed on or before April 25, 1991. In all cases prior to the dealer's claim being approved, they must satisfactorily show to the Department that the tax has been refunded to the customer.

The Department will require dealers eligible for refund consideration to submit a list of all parts and labor, provided under the terms of the warranty for which tax was refunded, and the tax will be due thereon. Dealers ineligible for a refund will not be liable for tax on repair parts and labor performed, provided tax was collected on the initial sale of the warranty.

Claim for refund made directly to the Department by the customer will not be honored.

We believe that the opinions expressed are correct and are in keeping with the law, including the 1991 amendment and the recent court opinion.

Sincerely,

/s/

Joe Huddleston
Commissioner

AFTER 6/20/90 (CHANCERY COURT INVALIDATES RULE 54, SALES TAX ON WARRANTY CONTRACTS)		
	Department of Revenue action:	
Customer files refund claim	DENIED —	only vendor can file claim
	—	warranty contracts taxable under Rule 54
Automobile dealer files refund claim	DENIED —	tax not refunded to consumer
	—	warranty contracts taxable under Rule 54
FROM 3/26/91 TO 4/25/91 (CHAPTER 80'S THIRTY-DAY WINDOW)		
Customer files refund claim	DENIED —	only vendor can file claim
	—	warranty contracts still taxable under Rule 54
Automobile dealer files refund claim	DENIED —	tax not refunded to customer
	—	warranty contracts taxable under Rule 54
AFTER MARCH 2, 1992 (SUPREME COURT DECIDES COVINGTON PIKE INVALIDATING RULE 54)		
Customer files refund claim	DENIED —	only vendor can file claim
	—	barred by Chapter 80's thirty day limit
Automobile dealer files refund claim	DENIED —	tax not refunded to customer
	—	barred by Chapter 80's thirty day limit

CLAIM FOR REFUND
Filed With
State of Tennessee
Department of Revenue
Nashville
(This Claim for Refund Must Be Executed
and Filed in Duplicate)

Name of Taxpayer Woodson Tenent Laboratories, Inc., individually and on behalf of a class of similarly situated persons and entities

Street Address c/o Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, 165 Madison, 21st fl.
City and State Memphis, Tennessee 38103
County Shelby
Kind of Tax Sales Tax
Taxable Period (or year) 1/1/89 - 3/26/91
Date Tax Paid 1/1/89 - 3/26/91
Amount Paid $25,000,000 (est.)
Amount Claimed as Refund $25,000,000

Basis of Claim (Attach schedules if additional space is required):
During period 1/1/89 through 03/26/91, taxpayers who purchased extended warranty contracts in connection with the purchase of new or used vehicles in Tennessee, paid sales tax on the extended warranty contracts. Woodson Tenent Laboratories purchased an extended warranty contract on 5/31/89 for $790.00 and paid sales tax in the amount of $61.23. As determined by the Tennessee

Supreme Court in Covington Pike Toyota, Inc. v. Cardwell, 829 S.W.2d 132 (Tenn. 1992), decided March 2, 1992, the Department of Revenue was not authorized to collect sales tax on extended warranty contracts. The sales tax collected on the extended warranty contracts was illegally and improperly collected, and taxpayer requests a refund of the illegally collected taxes. Taxpayer requests refund for taxes paid individually and on behalf of all other similarly situated entities. Copies of taxpayer's Bill of Sale and extended warranty contract supporting taxpayer's claim are provided as enclosures.

Under the penalties of perjury I declare that the statements made in support of this claim are true, correct and complete, to the best of my knowledge and belief.

NAME s/s
Edward R. McCarthy
TITLE President Woodson-Tenent Laboratories, Inc.
(Signature of Taxpayer, Officer,
or Authorized Representative)
DATE 11-11-92

The section of this Claim for Refund reserved for execution by the Department of Revenue and which was not executed on this document because the claim was denied was omitted in printing.

CLAIM FOR REFUND
Filed With
State of Tennessee
Department of Revenue
Nashville
(This Claim for Refund Must Be Executed
and Filed in Duplicate)

Name of Taxpayer Lars M. Reimann, individually and on behalf of a class of similarly situated persons

Street Address c/o Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, 165 Madison 21st fl.
City and State Memphis, Tennessee 38103
County Shelby
Kind of Tax Sales Tax
Taxable Period (or year) 1/1/89 - 3/26/91
Date Tax Paid 1/1/89 - 3/26/91
Amount Paid $25,000,000 (est.)
Amount Claimed as Refund $25,000,000

Basis of Claim (Attach schedules if additional space is required):
During period 1/1/89 through 03/26/91, taxpayer who purchased extended warranty contracts in connection with the purchase of new or used vehicles in Tennessee paid sales tax on the extended warranty contracts. Lars M. Reimann, individually, purchased an extended warranty contract on 12/19/90 for $850.00 and paid sales tax of $65.88. As determined by the Tennessee Supreme Court in Covington Pike Toyota, Inc. v. Cardwell, 829 S.W.2d 132 (Tenn. 1992), decided March 2, 1992, the Department

of Revenue was not authorized to collect sales tax on extended warranty contracts. The sales tax collected on the extended warranty contracts was illegally and improperly collected, and taxpayer requests a refund of the illegally collected taxes. Taxpayer requests refund for taxes paid individually and on behalf of all other similarly situated individuals. Copies of Bill of Sale and extended warranty contract supporting taxpayer's claim are attached as enclosures.

Under the penalties of perjury I declare that the statements made in support of this claim are true, correct and complete, to the best of my knowledge and belief.

NAME s/s
TITLE Taxpayer
(Signature of Taxpayer, Officer,
or Authorized Representative)
DATE November 11, 1992

The section of this Claim for Refund reserved for execution by the Department of Revenue and which was not executed on this document because the claim was denied was omitted in printing.

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC., individually and on behalf of a class of persons and entities similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 101490-2
JOE HUDDLESTON, in his capacity as Commissioner of Revenue for the State of Tennessee,	)	
Defendant.	)	

MOTION TO DISMISS

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT FOR THE THIRTIETH JUDICIAL DISTRICT:

Comes the Defendant Joe Huddleston, the Commissioner of Revenue for the State of Tennessee, and by and through counsel moves this Court to dismiss the Plaintiffs' Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Tennessee Rule of Civil Procedure 12.02(1) and (6). The Commissioner further requests this Court to award him the appropriate attorneys' fees and expenses under T.C.A. § 67-1-1803(d), and grant such further relief as this Court deems appropriate. In support of this motion, the Commissioner relies upon his memorandum and addendum of cases filed contemporaneously with this motion, and the entire record.

Respectfully submitted this 18th day of August, 1992.

CHARLES W. BURSON
Attorney General and Reporter

/s/
WILLIAM E. YOUNG (#9711)
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-1902

Counsel for the Defendant
Commissioner of Revenue

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion to Dismiss has been forwarded by U.S. Mail, postage pre-paid, to:

John R. Gregory, Esq.
George T. Lewis, III, Esq.
Counsel for Plaintiffs
2100 First Tennessee Building
Memphis, Tennessee 38103

on this the 18th day of August, 1992.

/s/
WILLIAM E. YOUNG
Assistant Attorney General

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC., individually and on behalf of a class of persons and entities similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 101490-I
JOE HUDDLESTON, in his capacity as Commissioner of Revenue for the State of Tennessee,	)	
Defendant.	)	

ORDER GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT

Plaintiffs Lars M. Reimann and Woodson Tenent Laboratories, Inc., individually and on behalf of a class of

persons and entities similarly situated, having filed a Motion For Leave To Amend Complaint, and the Defendant having filed his reply stating that he has no position on Plaintiffs' Motion For Leave To Amend, all from which it appears to the Court that Plaintiffs' Motion For Leave To Amend is well taken and should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion For Leave To Amend filed on behalf of Plaintiffs is hereby granted and the Complaint is hereby amended as provided in the Amended Complaint For Class Action and For Money Damages attached to this Order as Exhibit "A".

/s/_____
CHANCELLOR NEAL SMALL

DATE APPROVED:_____

/s/_____
George T. Lewis, III
Attorney for Plaintiffs

/s/_____
William E. Young
Assistant Attorney General
Attorney for Defendant

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

LARS M. REIMANN and WOODSON TENENT LABORATORIES, INC., individually and on behalf of a class of persons and entities similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 101490-III
JOE HUDDLESTON, in his capacity as Commissioner of Revenue for the State of Tennessee,	)	
Defendant.	)	

AMENDED COMPLAINT FOR CLASS ACTION AND FOR MONEY DAMAGES

Comes now the Plaintiffs, by and through their attorneys of record, and would hereby amend their complaint as follows:

Plaintiff would amend paragraph 6 of its complaint to add the following language:

> 6. Collection of the tax from similarly situated taxpayers is illegal; moreover, collection of the tax from non-resident taxpaying entities constitutes an impermissible burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution. The Defendant does not have a statutory refund mechanism which affords these taxpayers a constitutional remedy. The refund statues have no mechanism for aggregating small and numerous claims. The Department of Revenue and the Attorney General of the State of Tennessee take the position that taxpayers must follow these refund statutes in order to be refunded illegally collected taxes. Plaintiff alleges that these refund statutes, as interpreted by the Department of Revenue and the Attorney General of the State of Tennessee constitute an impermissible burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution, a violation of the Due Process Clause of the United States Constitution, a violation of Article I, Section 20 of the Constitution of the State of Tennessee, Article 1, Section 17 of the Constitution of the State of Tennessee and

the prohibition against retroactive laws of the Tennessee Constitution.

Moreover, and in the alternative, even if the statutory scheme for refund of unlawfully collected taxes does not constitute an impermissible burden upon interstate commerce in violation of the Commerce Clause and Due Process Clause of the United States Constitution, and/or the Constitution of the State of Tennessee, the administration of these statutes by the Department of Revenue as to this specific tax has constituted and continues to constitute a violation of the Commerce Clause of the United States Constitution, and the Due Process Clause of the United States Constitution, Article I, Section 20 of the Constitution of the State of Tennessee, Article 1, Section 17 of the Constitution of the State of Tennessee and the prohibition against retroactive laws of the Tennessee Constitution. The Department of Revenue has taken positions with respect to refunds of these taxes which have effectively foreclosed any efforts by either a dealer or consumer to be refunded these taxes. Upon information and belief, Plaintiff alleges that the state has issued memoranda and correspondence to taxpaying dealers and taxpayers which have chilled and foreclosed any effort on the part of the dealers or consumer/taxpayers from receiving a refund.

Copies of memorandum and correspondence supporting Plaintiff's allegation are attached to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss.

With respect to Plaintiff's declaratory judgment action set out in paragraphs 14 through 16 of the original Complaint, Plaintiff alleges alternatively that this Court need not issue a declaratory judgment in this cause of action. This Court can merely decide whether or not Public Chapter No. 80 of the Public Acts of Tennessee of the 1991 session of the General Assembly can be enforced as a bar to Plaintiff's cause of action. In the event that this Court determines that a declaratory judgment action is not available against the State of Tennessee, Plaintiff amends its Complaint to withdraw said declaratory judgment and to allege alternatively that this Court should not enforce this public act against these Plaintiffs since the public act is unconstitutional under the United States and Tennessee constitutions.

Respectfully submitted,

/s/_____.

George T. Lewis, III (7018)
2100 First Tennessee Bldg.
Memphis, Tennessee 38103
(901) 526-2000

/s/_____

John R. Gregory
2100 First Tennessee Bldg.
Memphis, Tennessee 38103
(901) 526-2000

/s/_____

Kathryn K. Theofilos
2100 First Tennessee Bldg.
Memphis, Tennessee 38103
(901) 526-2000

CERTIFICATE OF SERVICE

_____The undersigned does hereby certify that a copy of the foregoing document has been served on William E. Young, 450 James Robertson Parkway, Nashville, Tennessee 37219-0485 by depositing same in the U.S. Mail, postage prepaid, this the __ day of _____, 1992.

/s/_____

67-6-501. Tax collected from dealer.—(a) Every dealer making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, or furnishing any of the things or services taxable under this chapter, shall be liable for the tax imposed by this chapter.

(b) The tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(c) The aforementioned tax at the rate provided by law of the retail sales price, as of the moment of sale, or of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in § 67-6-102, engaged as dealers, as defined in § 67-6-102, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of tangible personal property, or in the furnishing of any of the things or services taxable under this chapter.